

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

MA ZENIF E. INTAL, ) No. 1:18-cv-03196-SJ-JRC  
 )  
 Plaintiff, ) Brooklyn, NY  
 ) July 8, 2021  
 vs. )  
 )  
 ERIE AGUSTIN, M.D. PRIMARY )  
 CARE, P.C. ET AL, )  
 )  
 Defendants. )

TRANSCRIPT OF CHEEKS HEARING  
BEFORE THE HONORABLE JAMES R. CHO  
UNITED STATES MAGISTRATE JUDGE

**APPEARANCES (all appearances by audio or video):**

For the Plaintiff: DOUGLAS B. LIPSKY, ESQ.  
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## I N D E X

2 RULINGS: PAGE LINE  
Settlement agreement of parties approved. 8 13

## Colloquy

1                   THE COURT: Hi. Good morning, everyone. It's Judge  
2 Cho. We're hearing for a Cheeks hearing in Intal v. Erie  
3 Agustin, case number 18-CV-3196.

4                   Can the parties state their appearances for the  
5 record, starting with plaintiff?

6                   MR. LIPSKY: Good morning, Your Honor. Doug Lipsky  
7 and Milana Dostanitch of Lipsky Rowe for the plaintiff.

8                   THE COURT: Good morning.

9                   And for defendant?

10                  MR. CHONG: Good morning, Your Honor. Michael Chong  
11 for defendants and my summer intern, Alexia Butow (ph.).

12                  MS. BUTOW: Good morning.

13                  THE COURT: Hi. Good morning, everyone.

14                  And Mr. Chong, just to let you know, Mr. Lipsky and I  
15 worked together many years ago, I'd say more than a decade, at  
16 a law firm together. And I don't think that's going to be an  
17 issue, given how much time has passed. But I just wanted to be  
18 up front with you, Mr. Chong, that I do know Mr. Lipsky from my  
19 prior life at the law firm. Not his law firm, but a different  
20 law firm, so just so you're aware.

21                  Mr. Chong, it's not going to be an issue for you?

22                  MR. CHONG: No, Your Honor. But can you tell me if he  
23 was a very -- let's see, very just top attorney back then as he  
24 was in this case?

25                  THE COURT: Well, Mr. Lipsky, maybe I can speak for

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1 you. But seeing how you're cut from the same cloth and we grew  
2 up in the same law firm together, if I have a reputation as  
3 being a tough litigator then maybe it was from our prior  
4 experience at the old law firm. But maybe I can have Mr.  
5 Lipsky speak to that on his own behalf.

6 MR. LIPSKY: I think Lori Elman (ph.) would agree,  
7 Your Honor, that Seyfarth Shaw trained us well.

8 THE COURT: All right. So before I get into the  
9 proceeding, I do want to encourage the parties to consider  
10 consenting to me for all purposes going forward. In the event  
11 that consent doesn't happen, what I need to then do is order a  
12 transcript from today's hearing which will take time, also then  
13 draft a report and recommendation for Judge Johnson which will  
14 also take additional time. And then give the parties time to  
15 object if they want to, and then have Judge Johnson enter an  
16 order, which essentially will all take a lot of time and  
17 effort. But I do want to be up front with the parties that as  
18 of the submissions I've seen so far, I'm inclined to recommend  
19 approving this settlement. So I do want to let the parties  
20 know that this whole process can be expedited if the parties do  
21 consent to me. So I leave that to the parties to decide. But  
22 hopefully, by the end of today or end of the day tomorrow, the  
23 parties can make a decision on that and enter any appropriate  
24 consent form on ECF if they so desire just so we can expedite  
25 this entire process.

## Colloquy

1                   So with that I think we'll go into the Cheeks  
2 proceeding. I'll hear from plaintiff as to why they think the  
3 Court should approve this settlement agreement.

4                   MR. LIPSKY: Thank you, Your Honor. So this is a case  
5 that involves a little beyond the typical wage-and-hour case  
6 under Cheeks for minimum wage overtime as well as sexual  
7 harassment claims under the New York City Human Rights Law.  
8 The plaintiff worked for defendants from January 2017 to May  
9 2018 as essentially a receptionist. During that time as we  
10 allege in the complaint, she was not lawfully paid, and the  
11 owner of the clinic, Dr. Agustine, sexually harassed her more  
12 than once. Based on that, we assert the claims and the  
13 complaint. Defendants have vigorously denied those  
14 allegations.

15                  With the law suit being filed back May 2018, this case  
16 has a long history, including some mediation conferences before  
17 Magistrate Pollak. We were ultimately referred out to the  
18 court mediation program, and Pam Esterman was very instrumental  
19 in reaching -- having the parties reach a settlement agreement  
20 through a mediator's proposal, which was ultimately was 50,000  
21 dollars to resolve all the claims. We believe this settlement  
22 satisfies all the factors for that, and also determined a  
23 reasonableness of it. And I could go through those factors now  
24 if the Court wishes, or do you want me to fast forward to any  
25 other part --

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1                   THE COURT: Very briefly. I mean, I've read the  
2 submissions, but one, just so the record is complete, very  
3 briefly you can talk about those other factors.

4                   MR. LIPSKY: Sure. Here, I think one of the most  
5 important is that this is not a standard wage-and-hour case,  
6 that again this involves sexual harassment claims, and that is  
7 why this agreement, unlike typical agreements submitted under  
8 Cheeks, has a general release that is not limited just to the  
9 wage-and-hour claims because she -- plaintiff's alleged claims  
10 that go beyond wage-and-hour.

11                  One of the other major factors here is, plaintiff  
12 calculates her damages to be at least 200,000 dollars,  
13 including both from distress damages and the wage component.  
14 And the settlement is a fraction of that, and from plaintiff's  
15 perspective that is largely because of defendant's ability to  
16 satisfy a full judgment. And to test that, we obtained from  
17 defendants their financial records, that includes tax records,  
18 bank statements, financial statements for the corporate and  
19 individual defendant. In the settlement agreement, we had the  
20 individual defendant affirm that the records they provided us  
21 are complete and accurate. And weighing that, we decided it  
22 was a better decision to enter this agreement versus risk going  
23 forward and get a judgment that would just be an empirical  
24 victory.

25                  The settlement is getting paid out over a lengthy time

## Colloquy

1 period. To secure that, there's a consent judgment. So if  
2 defendant defaults, the total amount unpaid accelerates, along  
3 with a penalty provision that the corporate defendant and the  
4 individual defendant will be personally liable on the consent  
5 judgment. So we think putting that together, the settlement  
6 here is fair and reasonable. It also satisfies the  
7 requirements under Cheeks. The agreement is public. It was  
8 filed on the ECF system. The non-disparagement provision in  
9 the agreement is properly tailored allowing the plaintiff to  
10 discuss all truthful aspects of the case and the case  
11 proceedings. And the difference here from other Cheeks cases,  
12 again that here there's a general release, but that's because  
13 they're more than wage-and-hour claims which courts have  
14 approved in similar circumstances.

15 As to the fee component, we are seeking one-third of  
16 the total settlement amount plus expenses, which is routinely  
17 approved. The one-third fee application is a significant  
18 discount of our Lodestar. And the Lodestar was based on the  
19 hourly rates of 400 dollars per hour for me, 300 dollars per  
20 hour for Ms. Dostanitch our associate, and a 95-dollar hour  
21 rate for our paralegal, which are rates -- I'm sure it was --  
22 gets approved in this district. And expenses are all  
23 documented in the affidavit that we submitted, which includes  
24 everything from an independent mental health expert report to  
25 court filings.

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1           And for those reasons, we believe, Your Honor, that  
2 this court satisfies all factors for it to be reasonable and  
3 the requirements under the Second Circuit decision in Cheeks.

4           THE COURT: Thank you, Mr. Lipsky.

5           Mr. Chong, do you want to be heard?

6           MR. CHONG: No, Your Honor. I think that  
7 representation is fair. I'd do like to just put on the record  
8 that these claims that the plaintiff asserted, we dispute them.  
9 We claim they're false. I know Mr. Lipsky stated that they  
10 were, in fact, true, but they're disputed and they deny them.  
11 So for what that's worth.

12          THE COURT: All right. Thank you.

13          Now having heard the parties' explanation today as to  
14 why the settlement agreement is fair and reasonable under  
15 Cheeks as well as taking into consideration the parties are in  
16 submission seeking approval of the settlement agreement, I'm  
17 prepared to recommend and find that the settlement agreement is  
18 fair and reasonable for the following reasons. I understand  
19 that the plaintiff worked as a receptionist at a medical clinic  
20 from approximately January 2017 until March of 2018. In her  
21 complaint she's alleging both wage-and-hour claims under New  
22 York law and the FLSA, as well as a sex harassment claim under  
23 the New York City Human Rights Law. It was also represented  
24 that the gross total potential recovery less interest or  
25 liquidated damages is about 200,000 dollars. I also understand

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1 that defendant denies any wrongdoing, denies that plaintiff  
2 worked the hours she claimed, and also denies the sexual  
3 harassment claim. I do note for the record that the parties  
4 have reached a settlement agreement in the amount of 50,000  
5 dollars.

6 I do want to note one correction, though. I noticed  
7 some of the papers talk about once there's recovery of the  
8 settlement amount. It appears, though, that the one-third for  
9 the attorneys' fees is not based on the 50,000 dollars but  
10 50,000 less expenses. So I just want to make that clear for  
11 the record.

12 So the considerations I've taken into account, one,  
13 are the representations regarding defendants' precarious  
14 financial position and real issues as to ability to pay and  
15 ultimately collectability. In terms of the monetary terms of  
16 the settlement, it provides for an eighteen-month payout of  
17 \$2,777.78 per payout, with the total payout to plaintiff of  
18 \$25,780.32, part of which is allocated for the wage-and-hour  
19 claim and the other part allocated toward emotional distress  
20 damages for the sex harassment, the nonwage-and-hour claim.

21 I also note that the attorneys' fees sought in this  
22 case is \$12,891.05, which represents as I mentioned earlier  
23 one-third of the settlement amount less expenses. And the  
24 expenses are in the amount of \$11,328.49. And the Court also  
25 finds with approval that the payment to the plaintiff and the

## Colloquy

1 attorney at the same time in equal installments over that  
2 eighteen-month period of time is fair and reasonable.

3 So in terms of my consideration of the fairness and  
4 reasonableness of the agreement, I do note that both parties  
5 identify certain potential litigation risks involved in this  
6 case, given real dispute as to the underlying facts and  
7 potential legal issues in this case warranting a settlement.

8 As noted earlier, I do note that defendant has financial  
9 issues, which may pose collectability problems for the  
10 plaintiff also necessitating in favoring a settlement at this  
11 point in time. I also note that the parties engaged in arms-  
12 length negotiation with experienced counsel on both sides and  
13 also with the assistance of one of our mediators, Pamela  
14 Esterman.

15 I've reviewed the settlement agreement. I do note  
16 that there is a general release, and in typical wage-and-hour  
17 claims those general releases are frowned upon. But because  
18 this case is different in the sense that you have a nonwage-  
19 and-hour claim as well, courts have approved settlement  
20 agreements with general releases in them. As I noted earlier  
21 that a portion of the payment being made to the plaintiff is  
22 consideration for the settlement of a nonwage-and-hour claims  
23 as well. I also note that the settlement agreement contains a  
24 non-disparagement provision. While those are general  
25 disfavored in FLSA cases, I do note for the record also that

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1 there is a carveout in the non-disparagement provision with  
2 language that has been approved by other courts as well in  
3 Second Circuit.

4 Now turning to the attorneys' fee provision, as noted  
5 plaintiffs are seeking one-third recovery for attorneys' fees  
6 based on the 50,000-dollar settlement less expenses. I've  
7 compared that the Lodestar amount calculation, which courts  
8 oftentimes do, and I do note without expressing any opinion as  
9 to the reasonableness of the attorneys' fees or the billable  
10 rate in this case that the Lodestar amount total based on 104  
11 hours of work is about 34,000 dollars, which is far greater  
12 than the attorneys' fees sought in this settlement agreement.  
13 So based on that, I do find that the attorneys' fees request in  
14 this case is fair and reasonable.

15 Quick question for you, Mr. Lipsky. I'm assuming that  
16 the attorneys' fees set forth in the settlement agreement is  
17 the total amount that you will be getting in this case; is that  
18 correct? And you're not going to be recovering any additional  
19 attorneys' fees beyond that?

20 MR. LIPSKY: Correct, Your Honor. The only condition  
21 under which we would be entitled to additional fees is under --  
22 if we have to execute and enforce a consent judgment. Beyond  
23 that limited circumstance, this is the total amount of fees  
24 that we are seeking in this case.

25 THE COURT: All right. Thank you.

## Colloquy

1                   So after having held this fairness hearing and having  
2 reviewed the parties' submissions, I find that the settlement  
3 reached here is fair and reasonable of plaintiff's claims. And  
4 considering the amount received, the issues of potential  
5 liability that might have limited recovery, the fact that the  
6 parties engaged in arms-length negotiations with experienced  
7 counsel on both sides, and with the parties having sufficient  
8 understanding as to the risks and benefits of proceeding with  
9 litigation going forward, I also find that the attorneys' fees  
10 and costs requested here are reasonable. And I'm prepared to  
11 recommend approval of the settlement agreement.

12                  So typically if this case were in front of me, I would  
13 ask the parties to file a stipulation of dismissal within  
14 thirty days or so. So I again encourage the parties to  
15 consider consenting to me, so I can go ahead and approve the  
16 settlement agreement once I get that consent immediately.  
17 Otherwise, I'll have to wait until we get a transcript from  
18 today's proceeding.

19                  All right. Anything else we need to address for  
20 plaintiff?

21                  MR. LIPSKY: No, Your Honor. Thank you.

22                  THE COURT: All right. Anything else for defendant?

23                  MR. CHONG: Nothing, Your Honor. Thank you.

24                  THE COURT: Okay. With that, we're adjourned.

25                  Thanks, everyone. Have a nice day.

Colloquy

1 MR. LIPSKY: Thank you, Your Honor.

2 (Court is adjourned)

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## C E R T I F I C A T I O N

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3 I, Amanda G. Stockton, court-approved transcriber, do  
4 hereby certify the foregoing is a true and correct transcript  
5 from the official electronic sound recording of the proceedings  
6 in the above-entitled matter.

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July 29, 2021

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Amanda G. Stockton, CET-1323

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